TUESDAY MORNING
JULY 30, 2002

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 1

Theresa and Henry were married and had one child, Craig. In 1990, Theresa executed a valid will leaving Henry all of her property except for a favorite painting, which she left to her sister, Sis. Theresa believed the painting was worth less than $500.

On February 14, 1992, Theresa typed, dated, and signed a note, stating that Henry was to get the painting instead of Sis. Theresa never showed the note to anyone.

In 1994, Theresa hand-wrote a codicil to her will, stating: "The note I typed, signed, and dated on 2/14/92 is to become a part of my will." The codicil was properly signed and witnessed.

In 1995, Theresa's and Henry's second child, Molly, was born. Shortly thereafter, Henry, unable to cope any longer with fatherhood, left and joined a nearby commune. Henry and Theresa never divorced.

In 1999, Theresa fell in love with Larry and, with her separate property, purchased a $200,000 term life insurance policy on her own life and named Larry as the sole beneficiary.

In 2000, Theresa died. She was survived by Henry, Craig, Molly, Sis, and Larry.

At the time of her death, Theresa's half of the community property was worth $50,000, and the painting was her separate property. When appraised, the painting turned out to be worth $1 million.

What rights, if any, do Henry, Craig, Molly, Sis, and Larry have to:

1. Theresa's half of the community property? Discuss.

2. The life insurance proceeds? Discuss.

3. The painting? Discuss.

Answer according to California law.

QUESTION 2

Able owned Whiteacre in fee simple absolute. Baker owned Blackacre, an adjacent property. In 1999, Able gave Baker a valid deed granting him an easement that gave him the right to cross Whiteacre on an established dirt road in order to reach a public highway. Baker did not record the deed. The dirt road crosses over Whiteacre and extends across Blackacre to Baker's house. Both Baker's house and the dirt road are plainly visible from Whiteacre.

In 2000, Able conveyed Whiteacre to Mary in fee simple absolute by a valid general warranty deed that contained all the typical covenants but did not mention Baker's easement. Mary paid Able $15,000 for Whiteacre and recorded her deed.

Thereafter, Mary borrowed $10,000 from Bank and gave Bank a note secured by a deed of trust on Whiteacre naming Bank as beneficiary under the deed of trust. Bank conducted a title search but did not physically inspect Whiteacre. Bank recorded its deed of trust. Mary defaulted on the loan. In 2001, Bank lawfully foreclosed on Whiteacre and had it appraised. The appraiser determined that Whiteacre had a fair market value of $15,000 without Baker's easement and a fair market value of $8,000 with Baker's easement. Bank intends to sell Whiteacre and to sue Mary for the difference between the sale price and the loan balance.

The following statute is in force in this jurisdiction:

> Every conveyance or grant that is not recorded is void as against any subsequent good faith purchaser or beneficiary under a deed of trust who provides valuable consideration and whose interest is first duly recorded.

1. What interests, if any, does Baker have in Whiteacre? Discuss.

2. What interests, if any, does Bank have in Whiteacre? Discuss.

3. What claims, if any, may Mary assert against Able? Discuss.

QUESTION 3

Betty, a prominent real estate broker, asked her attorney friend, Alice, to represent her 18 year-old son, Todd, who was being prosecuted for possession of cocaine with intent to distribute. Betty told Alice that she wanted to get the matter resolved "as quickly and quietly as possible." Betty also told Alice that she could make arrangements with a secure in-patient drug rehabilitation center to accept Todd and that she wanted Alice to recommend it to Todd. Although Alice had never handled a criminal case, she agreed to represent Todd and accepted a retainer from Betty.

Alice called her law school friend, Zelda, an experienced criminal lawyer. Zelda sent Alice copies of her standard discovery motions. Zelda and Alice then interviewed Todd. Alice introduced Zelda as her "associate." Todd denied possessing, selling, or even using drugs. Todd said he was "set up" by undercover officers. After Todd left the office, Zelda told Alice that if Todd's story was true, the prosecution's case was weak and there was a strong entrapment defense. Alice then told Zelda that she, Alice, could "take it from here" and gave her a check marked "Consultation Fee, Betty's Case."

Alice entered an appearance on Todd's behalf and filed discovery motions, showing that she was the only defense counsel.

At a subsequent court appearance, the prosecutor offered to reduce the charge to simple felony possession and to agree to a period of probation on the condition that Todd undergo a one year period of in-patient drug rehabilitation. Alice asked Todd what he thought about this, and Todd responded: "Look, I'm innocent. Don't I have any other choice?" Alice, cognizant of Betty's wish to get the matter resolved, told Todd she thought it was Todd's best chance. Based on Alice's advice, Todd accepted the prosecution's offer, entered a guilty plea, and the sentence was imposed.

Has Alice violated any rules of professional responsibility? Discuss.

THURSDAY MORNING
AUGUST 1, 2002

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 4

Travelco ran a promotional advertisement which included a contest, promising to fly the contest winner to Scotland for a one-week vacation. Travelco's advertisement stated: "The winner's name will be picked at random from the telephone book for this trip to 'Golfer's Heaven.' If you're in the book, you will be eligible for this dream vacation!"

After reading Travelco's advertisement, Polly had the telephone company change her unlisted number to a listed one just in time for it to appear in the telephone book that Travelco used to select the winner. Luckily for Polly, her name was picked, and Travelco notified her. That night Polly celebrated her good fortune by buying and drinking an expensive bottle of champagne.

The next day Polly bought new luggage and costly new golfing clothes for the trip. When her boss refused to give her a week's unpaid leave so she could take the trip, she quit, thinking that she could look for a new job when she returned from Scotland.

After it was too late for Polly to retract her job resignation, Travelco advised her that it was no longer financially able to award the free trip that it had promised.

Polly sues for breach of contract and seeks to recover damages for the following: (1) cost of listing her telephone number; (2) the champagne; (3) the luggage and clothing; (4) loss of her job; and (5) the value of the trip to Scotland.

1. What defenses should Travelco assert on the merits of Polly's breach of contract claim, and what is the likely outcome? Discuss.

2. Which items of damages, if any, is Polly likely to recover? Discuss.

QUESTION 5

Manufacturer (Mfr.) advertised prescription allergy pills produced by it as "the modern, safe means of controlling allergy symptoms." Although Mfr. knew there was a remote risk of permanent loss of eyesight associated with use of the pills, Mfr. did not issue any warnings. Sally saw the advertisement and asked her doctor (Doc) to prescribe the pills for her, which he did.

As a result of taking the pills, Sally suffered a substantial loss of eyesight, and a potential for a complete loss of eyesight. Sally had not been warned of these risks, and would not have taken the pills if she had been so warned. Doc says he knew of the risk of eyesight loss from taking the pills but prescribed them anyway because "this pill is the best-known method of controlling allergy symptoms."

Bud, Sally's brother, informed Sally that he would donate the cornea of one of his eyes to her. Bud had excellent eyesight and was a compatible donor for Sally. This donation probably would have restored excellent eyesight to one of Sally's eyes with minimal risk to her. The expenses associated with the donation and transplantation would have been paid by Sally's medical insurance company. Sally, however, was fearful of undergoing surgery and refused to have it done. Thereafter, Sally completely lost eyesight in both of her eyes.

Sally filed a products liability suit against Mfr. seeking to recover damages for loss of her eyesight. She also filed a suit for damages against Doc for negligence in prescribing the pills.

What must Sally prove to make a prima facie case in each suit, what defenses might Mfr. and Doc each raise, and what is the likely outcome of each suit? Discuss.

QUESTION 6

In 1997, Hank and Wanda, both domiciled in Illinois, a non-community property state, began dating regularly. Hank, an attorney, told Wanda that Illinois permits common-law marriage. Hank knew this statement was false, but Wanda reasonably believed him. In 1998, Wanda moved in with Hank and thought she was validly married to him. They used Hank's earnings to cover living expenses. Wanda deposited all her earnings in a savings account she opened and maintained in her name alone.

In February 2000, Hank and Wanda moved to California and became domiciled here. By that time Wanda's account contained $40,000. She used the $40,000 to buy a parcel of land in Illinois and took title in her name alone.

Shortly after their arrival in California, Wanda inherited an expensive sculpture. Hank bought a marble pedestal for their apartment and told Wanda it was "so we can display our sculpture." They both frequently referred to the sculpture as "our collector's prize."

In March 2000, a woman who claimed Hank was the father of her 6 year-old child filed a paternity suit against Hank in California. In September 2000, the court determined Hank was the child's father and ordered him to pay $800 per month as child support.

In January 2002, Wanda discovered that she never has been validly married to Hank. Hank moved out of the apartment he shared with Wanda.

Hank has not paid the attorney who defended him in the paternity case. Hank paid the ordered child support for three months from his earnings but has paid nothing since.

1. What are Hank's and Wanda's respective rights in the parcel of land and the sculpture? Discuss.

2. Which of the property set forth in the facts can be reached to satisfy the obligations to pay child support and the attorney's fees? Discuss.

Answer according to California law.

TUESDAY AFTERNOON
JULY 30, 2002

California
Bar
Examination

Performance Test A

INSTRUCTIONS AND FILE

IN RE THOMAS OUTDOOR ADVERTISING

IN RE THOMAS OUTDOOR ADVERTISING

INSTRUCTIONS

1. You will have three hours to complete this performance test. This session of the examination is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States. Columbia is located within the jurisdiction of the fictional United States Court of Appeals for the Fifteenth Circuit.
3. You will have two sets of materials with which to work: A **File** and a **Library**. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
4. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page numbers.
5. Your response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing.
7. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization. Grading of the two tasks will be weighted as follows:

Task 1 — 70%
Task 2 — 30%

SCHELLY & KATZ, LLP
2800 BLAKE STREET
FAIRVIEW, COLUMBIA 55515

MEMORANDUM

To: **Applicant**
From: **Judith M. Schelly**
Date: **July 30, 2002**
Subject: **In re Thomas Outdoor Advertising**

The Benton City Council today placed on the agenda for its August 6, 2002 meeting a proposed ordinance relating to outdoor advertising in the form of billboards. The proposed ordinance is quite controversial. It would effect a change from the currently unregulated state of affairs, and impose, for the first time, various restrictions and even outright prohibitions.

We represent Stephen Thomas, the sole proprietor of Thomas Outdoor Advertising, a relatively new but fast growing business. Thomas objects to the proposed ordinance because he believes that, if enacted, it would threaten the general well-being of Benton and his profitability as well.

I have an appointment with the City Attorney to discuss the proposed ordinance. To help me prepare for that meeting, please draft a memorandum for me that:

1. Analyzes the constitutionality of the proposed ordinance, being sure to identify and evaluate the arguments that I can make to the City Attorney in support of the position that it is in fact unconstitutional; and

2. Identifies and discusses specific modifications that can be made to the proposed ordinance that will meet both Thomas's stated goals and the city's expressed concerns and still be constitutional. Do not redraft the proposed ordinance.

BENTON *EXPRESS*

July 15, 2002

* * * * *

Billboards? In Benton?

By Elizabeth D'Orazio, *Express* Staff Writer

You wouldn't think that billboards could have raised such a ruckus — unless, that is, you live in Avalon County and, especially, the City of Benton.

For just about as long a time as most folks can remember, Patrick Curtan has been the "King of Billboards" in this rural county and its oldest city.

Most of Curtan's billboards are like others you see throughout the state, and, indeed, throughout the country, advertising major brands of gasoline, familiar soft drinks, and ubiquitous fast food restaurants.

But some of Curtan's billboards are altogether unique, advertising nothing more or less than his own idiosyncratic views on matters that the public is concerned about — or matters that he thinks the public *should* be concerned about.

Crusty, but somehow endearing in an odd sort of way, Curtan has found it hard to alienate anyone, even though practically no one has ever agreed with him. That's probably because his views have never been either liberal or conservative, progressive or reactionary, left or right. As one long-time friend, Al Waters, puts it, "Pat's a contrarian. He licks his finger, puts it up to see which way the wind is blowing — and then sets himself right into its blast." For example, at the height of the oil embargo in the early 1970's, he waged a campaign on his billboards urging county officials to buy only the most gas-guzzling of cars, ostensibly to put pressure on the federal government to allow wide-scale oil exploration throughout Alaska. But in the late 1990's, appearing on his billboards in a neon purple and pink costume as "SUVerman," he incited teenagers to "liberate" sports utility vehicles from their parents and turn them over to him for transformation into roadside planters.

Although Curtan has found it hard to alienate anyone, he has succeeded so far as one person is concerned — Benton City Council Member Sonia Hemphill. Hemphill is the architect of Benton's remarkable renaissance. About five years ago, with little support, she persuaded the City Council to establish Benton's Historical District. What was formerly a dilapidated collection of ramshackle shops with hardly any merchandise to speak of, and even fewer buyers, is now becoming a trendy mecca for the upscale visitor who has lots of money to spend on such essentials of the good life as free-range ostrich, heirloom fruits and vegetables, and boutique wines. "Curtan's billboards," says Hemphill, "might

put off the very people we want to attract. At the very least, they cast an unflattering light on the community, presenting the residents as unsophisticated bumpkins." She told Benton City Attorney Theodore J. Stroll, "Do whatever you can to deal with the problem."

This leaves Curtan, one might suspect, exactly where he wants to be — in the middle of the biggest ruckus his billboards have ever raised.

CITY OF BENTON

PROPOSED ORDINANCE RELATING TO OUTDOOR ADVERTISING

Section 1. Legislative Findings.

A. Aside from this ordinance, outdoor advertising in the form of billboards, as herein defined, is not regulated by any ordinance.

B. The lack of regulation of billboards has led in the past, and may lead in the future, to aesthetic blight because of visual clutter.

C. The lack of regulation of billboards has created in the past, and may create in the future, traffic safety hazards because of visual distraction.

D. The regulation of billboards specified herein is necessary to prevent aesthetic blight and traffic safety hazards.

Section 2. Definitions.

A. "Billboard" is any structure, object, device, or part thereof, situated outdoors that advertises, identifies, displays, or otherwise relates to a person, thing, institution, organization, activity, condition, business, good, service, event, or location by any means, including words, letters, numerals, figures, designs, symbols, fixtures, colors, motion, illumination, or projected images.

B. "On-site/commercial" billboard is any billboard, as defined herein, advertising, identifying, displaying, or otherwise relating to any business conducted on the parcel on which it is located and/or any good or service produced by such business or made available by such business for purchase thereon.

C. "Off-site/commercial-or-noncommercial" billboard is any billboard, as defined herein, other than an on-site/commercial billboard, as defined herein, advertising, identifying, displaying, or otherwise relating to any person, thing, institution, organization, activity, condition, business, good, service, event, or location.

D. "Historical District" is that area of the city so established by the City of Benton Historical District Ordinance enacted on July 14, 1997.

Section 3. Regulation.

A. Any person may erect and maintain an on-site/commercial billboard in the Historical District.

B. No person shall erect or maintain any off-site/commercial-or-noncommercial billboard in the Historical District, with the exception of off-site/commercial-or-noncommercial billboards with commemorative historical signs, service club signs, or signs depicting time, temperature, and news.

Section 4. Declaration of Public Nuisance and Removal.

A. Any billboard erected or maintained in violation of any of the provisions herein is declared a public nuisance.

B. Any billboard declared a public nuisance hereunder may immediately be removed by the Director of Public Works.

Section 5. Expenses and Fine.

A. Each and every person who is responsible for erecting and/or maintaining any billboard declared a public nuisance hereunder is jointly and severally liable for any and all expenses incurred by the Director of Public Works in its removal.

B. Each and every person who is responsible for erecting and/or maintaining any billboard declared a public nuisance hereunder is subject to a fine not exceeding $10,000.

OFFICE OF THE CITY ATTORNEY
July 19, 2002

COLUMBIA OUTDOOR ADVERTISING ASSOCIATION
FACT SHEET

In 2001, individuals and entities in the United States spent about 2% of their advertising budget on outdoor advertising by means of billboards.

Over the years, individuals and entities have increasingly spent more money on billboards, and have increasingly made greater use of this medium.

Billboards have been shown to possess various strengths. For example, they quickly build awareness; create continuity of a brand or message; are adaptable, applying national or regional strategies within a local context; and provide geographic and demographic flexibility.

Judged by the cost of reaching their audience, billboards are more affordable than other media.

The appearance of billboards has changed in recent times, largely through the use of computer-painted vinyl, which provides high quality and consistent images; three-dimensional and moving displays; and innovative lighting.

Billboards provide significant direct economic contributions in wages and benefits to employees, in payments to vendors of goods and services, in lease payments to real property owners, and in commissions to advertising agencies, especially in rural areas and small cities.

Billboards also play a substantial role for businesses and other activities that are small, local, or tourist-related, especially, again, in rural areas and small cities.

TRANSCRIPT OF STEPHEN THOMAS INTERVIEW
July 25, 2002

Judith M. Schelly: Mr. Thomas, thank you for coming in. We're recording this session on audiotape with your permission, right?

Stephen Thomas: Yes.

Schelly: Could you tell me a bit about the outdoor advertising business in the County of Avalon and the City of Benton?

Thomas: Sure. For years, the business has been dominated by Patrick Curtan. Still is. The county is rural, and there's lots of space for billboards. He's tied up most of the best sites outside of the city and just within its fringes, with generous payments to the property owners. Over the years, he's made a great deal of money. Even when times were tough, he devoted space to his personal agenda. Now, when he's made more money than he could spend in three lifetimes, there's no stopping him. He's quite a character, that's for sure. But beneath all his flamboyance, he's a solid businessperson and a solid citizen. In any event, when the Benton Historical District Ordinance was under consideration about five years ago, I decided to get into outdoor advertising, not like Curtan with his national advertisers and his conventional billboards, but in a niche that would anticipate where I thought Benton would go.

Schelly: What do you mean?

Thomas: Benton's Historical District had a number of sites that could be used for billboards. All of them were available for lease. No one had tried to secure any of them.

Schelly: Why not?

Thomas: Benton was a city that time had passed by. There was hardly anyone there. And those who were there had little to sell and little to buy. But I thought that would change. It did. Well, I leased many of the best sites in the Historical District that could be used for billboards. The leases were generally for 25 years. I guaranteed the lessors a fixed minimum payment and provided for increased payments as my revenues increased. I manufactured the billboard structures myself to last at least 25 years — two and one-half times as long as the best billboards in the state. That kind of manufacturing makes my costs two or three times higher than those for conventional structures.

Schelly: You mentioned a niche?

Thomas: Yes. I figured that conventional billboards would look out of place in an historical district, even, and especially, the computer-painted vinyl ones with their sharp images. So I came up with a notion for something different. The displays on structures would conform to their surroundings — bricks and wood and stucco, as the case may be, and not paper or plastic. They would not change monthly, as is typical. Rather, they would vary with the seasons, and with local festivities within each season. Thus, there would be autumn displays, with appropriate adjustments for Harvest Time, Halloween, and

Thanksgiving. Most important, to my mind, would be their character. They would not advertise only the goods or services on sale at the location in question.

Schelly: You mean that a billboard at my antique store — let's say I owned an antique store — would advertise other antique stores?

Thomas: In a way. The billboard would advertise a group of antique stores. No, better, it would actually help create an antiques district.

Schelly: Doesn't that cut against the interests of the owner of the individual antique store?

Thomas: Not at all. You're acquainted with the "Diamond District" in midtown Manhattan in New York City?

Schelly: Of course.

Thomas: Well, it's a fact of economic life that when a vibrant area like the Diamond District is created, each business gets more customers, in spite of the competition it faces from other businesses, than it would have gotten otherwise — indeed, it gets more customers because of the competition.

Schelly: We see that phenomenon closer to home in the various "Auto Rows" throughout Columbia, don't we?

Thomas: Right.

Schelly: Have you put any displays up?

Thomas: Not yet, but we're not far off.

Schelly: Now, turning to the proposed ordinance —

Thomas: It's simply bad news all the way around. The Historical District as a whole depends on its various subdistricts — antiques, as we mentioned, gourmet, arts, etc. It needs ambience. Without ambience, you're not going to get enough people to come to buy the upscale commodities that it specializes in, certainly not enough people with the money to buy them. To be frank, the ordinance would be devastating to my business. I've invested about $2.5 million. Under the ordinance, I would lose most of it. I would probably have to shut down and let my employees go.

Schelly: How many employees do you have?

Thomas: I have a permanent staff of 10, plus 15 others who will stay with me until we finish manufacturing the structures.

Schelly: Why does the city want the proposed ordinance?

Thomas: It claims that it wants to avoid aesthetic and traffic problems. But billboards have never been regulated in the city. I've never heard any complaints about unsightliness. Then again, there haven't been many billboards. As for traffic, what traffic? The Historical District is basically a pedestrian mall. Everybody knows what's driving this — Hemphill's fight with Curtan. But Curtan's billboards are nowhere near the Historical District. I recognize that cities commonly regulate the appearance of

billboards. I wouldn't have a problem with that. How could I? That's what I'm selling. But what the city's proposing? No.

Schelly: So, what would you like to see happen?

Thomas: I just want to be able to run my business as planned.

Schelly: So, no ordinance would be best?

Thomas: No, some kind of design review and approval would be appropriate. Conventional billboards like Curtan's would be out of place in the Historical District. But they might prove tempting to some merchants because they would probably be much less expensive than mine.

Schelly: I think you've given me enough information to proceed. I'll keep you informed as things develop. Thanks for coming by.

Thomas: You're welcome.

OFFICE OF THE CITY ATTORNEY
CITY OF BENTON
1000 GROVE STREET
BENTON, COLUMBIA 55155

July 26, 2002

Judith M. Schelly
Schelly & Katz, LLP
2800 Blake Street
Fairview, Columbia 55515

Re: Proposed Ordinance Relating to Outdoor Advertising

Dear Ms. Schelly:

I am writing to memorialize our telephone conversation concerning the City of Benton's proposed ordinance relating to outdoor advertising in the form of billboards.

You stated that your client, Stephen Thomas of Thomas Outdoor Advertising, objects to the proposed ordinance on the ground that, if enacted, it would threaten the general well-being of Benton.

I responded that outdoor advertising ordinances are now as common as outside advertising itself, and that the proposed ordinance is hardly out of the mainstream.

I noted the background to the proposed ordinance, which was well known to you: Together with its residents and businesses, the city, as a small municipality in a rural county, had long been affected by the general decline that has plagued this area of the state; residents and businesses were quite poor, and city government was all but bankrupt. In 1997, the City of Benton Historical District Ordinance established the Historical District. In the years that have followed, the city has experienced a remarkable turnaround, attracting many visitors, including many quite affluent, to its crafts shops, antique stores, art galleries, artisanal bakeries and creameries, and inns and restaurants.

I further noted that outdoor advertising of even the common variety might negatively affect aesthetic values and traffic flow in the Historical District. Moreover, outdoor advertising of a controversial character might offend some visitors or at least cause some discomfort. To avoid any such problems, City Council Member Sonia Hemphill asked us to draft a proposed ordinance. We have done so. Although we are of the view that an ordinance may lawfully prohibit all outdoor advertising in

the Historical District, we have not taken that approach. Rather, the proposed ordinance would allow on-site/commercial billboards, which promote the goods or services on sale at the location in question, and certain off-site/commercial-or-noncommercial billboards. We think that this approach is a reasonable one, permitting steady economic growth for our residents and businesses and, consequently, financial stability for city government itself.

Let me observe, in conclusion, that the City Council will soon schedule a hearing on the proposed ordinance. You and your client are, of course, welcome to participate.

Should you wish to communicate with me in advance of the hearing, I remain available, as always, to consider any and all constructive suggestions.

Very truly yours,

Theodore J. Stroll
City Attorney

IN RE THOMAS OUTDOOR ADVERTISING

LIBRARY

CITY OF BENTON
HISTORICAL DISTRICT ORDINANCE

Section 1. Legislative Findings.

A. The area of the city bounded by Lincoln Avenue, Bliss Street, Flushing Avenue, and Lowery Street, hereinafter the "Historical District," has in recent years been so adversely affected by blight as to diminish the economic base of the city.

B. A master plan for the rehabilitation of the Historical District was recently adopted.

C. It is essential to the preservation of the aesthetic integrity of all buildings in the Historical District, and to the preservation of the ambience of the Historical District itself, that all such buildings be regulated to ensure consistency with surroundings in size, shape, color, and placement.

Section 2. Regulation.

* * * * *

C. Before erecting, modifying, or removing any building in the Historical District of whatever sort, all owners of real property, tenants, contractors, and others shall submit plans to the Director of Public Works for design review and approval for consistency with surroundings in size, shape, color, and placement.

* * * * *

F. Only pedestrian traffic shall be allowed in the Historical District, except as indicated in subsection G, below.

G. With the exception of police, fire, and similar governmental services, vehicular traffic shall be allowed in the Historical District only between the hours of 2:00 a.m. and 7:00 a.m., and then only as necessary for mercantile pick-ups and deliveries. Vehicular traffic for police, fire, and similar governmental services shall be allowed in the Historical District at all times.

* * * * *

ENACTED JULY 14, 1997

Metromedia, Inc. v. City of San Diego

United States Supreme Court (1981)

The City of San Diego enacted an ordinance that imposes substantial prohibitions on the erection of outdoor advertising displays in the form of billboards. The stated purpose of the ordinance is "to eliminate hazards to pedestrians and motorists brought about by distracting displays" and "to preserve and improve" the city's "appearance." The ordinance permits on-site commercial billboards, which generally advertise goods or services available on the property on which they are located, but forbids off-site billboards, which generally advertise or otherwise relate to goods or services or activities available or conducted elsewhere, unless permitted by one of several exceptions specified, such as for commemorative historical signs, service club signs, for-sale and for-lease signs, signs depicting time, temperature, and news, and temporary political campaign signs.

Metromedia, a company that was engaged in the outdoor advertising business in San Diego when the ordinance was passed, obtained an injunction in a state trial court, which concluded that the ordinance was facially invalid under the First Amendment's free speech clause as applied to the states and their cities through the Fourteenth Amendment's due process clause.

The state supreme court, however, set aside the injunction, holding that the ordinance was not facially invalid.

Holding to the contrary, we shall reverse and remand.

As with other media of communication, the government has legitimate interests in controlling the noncommunicative aspects of billboards, but the First Amendment forecloses similar interests in controlling their communicative aspects. Because regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, the courts must reconcile the government's regulatory interests with the individual's right to expression.

Insofar as it regulates commercial speech — that is, speech that does no more than propose a commercial transaction, or at least relates solely to the economic interests of the speaker and his audience — the ordinance is not facially unconstitutional. It meets the requirements articulated in our cases, which consider whether the regulation of such speech (1) serves a substantial governmental interest, (2) directly advances such interest, and (3) is no more extensive than necessary.

First, the ordinance's stated purpose to improve traffic safety and the beauty of the surroundings comprises substantial governmental interests. It is far too late to contend otherwise with respect to either objective.

Second, the ordinance directly serves the substantial governmental interests in traffic safety and beauty. We hesitate to disagree with the accumulated, common-sense judgments of local lawmakers that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that

these judgments are unreasonable. Nor do we find it speculative to recognize that billboards by their very nature, wherever located, can be perceived as an aesthetic harm. San Diego, like many other cities, has chosen to minimize the presence of such signs. Aesthetic judgments of this sort are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose. But there is no claim in this case that San Diego has as an ulterior motive of the suppression of speech, and the judgment involved here is not so unusual as to raise suspicions in itself.

Metromedia nevertheless argues that San Diego denigrates its interests in traffic safety and beauty and defeats its own case by permitting on-site commercial billboards. The ordinance permits the occupant of property to use billboards located thereon, even if distracting and unattractive, to advertise goods and services there offered; similar billboards, even if attractive and not distracting, that advertise goods or services available elsewhere are prohibited. But, whether on-site commercial billboards are permitted or not, the prohibition of off-site billboards is directly related to the stated objectives of traffic safety and beauty. This is not altered by the fact that the ordinance is underinclusive because it permits on-site commercial billboards. In addition, the city has obviously chosen to value one kind of commercial speech — that on on-site billboards — more highly than another kind of commercial speech — that on off-site billboards. It has evidently decided that the private interest in on-site commercial speech, but not the private interest in off-site commercial speech, is stronger than its own interests in traffic safety and beauty. Hence, it has effectively decided that in a limited instance — on-site commercial billboards — its interests should yield. We do not reject that judgment. As we see it, the city could reasonably conclude that a commercial enterprise — as well as the interested public — has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. It does not follow from the fact that the city has concluded that some commercial interests outweigh its interests in this context that it must give similar weight to all other commercial interests. Thus, off-site commercial billboards may be prohibited while on-site commercial billboards are permitted.

Third, the ordinance is no broader than necessary to accomplish the substantial governmental interests in traffic safety and beauty. Since San Diego has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously its most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. It has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of full accomplishment: It has not prohibited all billboards, but allows on-site commercial billboards and some others specifically excepted.

But, insofar as it bans noncommercial speech — including political speech, which deals with governmental affairs, and ideological speech, which concerns itself with philosophical, social, artistic, economic, literary, ethical, and similar matters — the ordinance is indeed facially unconstitutional.

The fact that San Diego may value commercial speech relating to on-site goods and services more highly than it values such speech relating to off-site goods and services does not justify prohibiting an occupant from displaying his own ideas or those of others. The First Amendment affords noncommercial speech a greater degree of protection than commercial speech. San Diego would effectively invert this state of affairs. The ordinance allows on-site commercial speech, but not noncommercial speech. The use of on-site billboards to carry commercial messages related to the commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited. The city does not explain how or why billboards with noncommercial messages would be more threatening to safe driving or would detract more from the beauty of the surroundings than billboards with commercial messages. Insofar as it tolerates billboards at all, it cannot choose to limit their content to commercial messages; it may not conclude that the communication of commercial messages concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.

Furthermore, because under the ordinance's specified exceptions San Diego allows some noncommercial messages on billboards, it must allow others. Although it may distinguish between the relative value of different categories of commercial speech, it does not have the same range of choice in the area of noncommercial speech. With respect to noncommercial speech, it simply may not choose the appropriate subjects for public discourse. To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for truth.

San Diego argues that the ordinance can be characterized as a time, place, and manner restriction that is reasonable and hence does not run afoul of the First Amendment. We disagree. The ordinance does not generally ban the use of billboards as an unacceptable "manner" of communicating information; rather, it permits various kinds of signs. Signs that are banned are banned everywhere and at all times. Time, place, and manner restrictions are reasonable if they (1) are justified without reference to the content of the regulated speech, (2) are narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication. Here, it cannot be assumed that alternative channels are available. Although, in theory, advertisers remain free to employ various alternatives, in practice they might find each such alternative either too costly or too ineffective or both.

Government restrictions on noncommercial speech are not permissible merely because the government does not favor one side over another on a subject of public controversy. Nor can a prohibition of all such speech carried by a particular mode of communication be upheld merely because the prohibition is rationally related to a nonspeech interest. Courts must protect First Amendment

interests against legislative intrusion, rather than defer to merely rational legislative judgments in this area. Since San Diego has concluded that its own interests are not as strong as private interests in the use of on-site commercial billboards, it may not claim that those same interests outweigh private interests in the use of noncommercial billboards.

The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

City Council v. Taxpayers for Vincent

United States Supreme Court (1984)

An ordinance of the City of Los Angeles prohibits the posting of signs on public property. Taxpayers for Vincent (Taxpayers), a group of supporters of Roland Vincent, a candidate for election to the Los Angeles City Council, entered into a contract with Candidates' Outdoor Graphics Service (COGS) to fabricate and post signs bearing Vincent's name. COGS produced such signs and attached them to utility poles at various locations. Acting under the ordinance, city employees routinely removed all signs, including COGS' for Vincent, attached to utility poles and similar objects covered by the ordinance.

Taxpayers and COGS then filed suit in Federal District Court against the City of Los Angeles, alleging that the ordinance abridged their freedom of speech within the meaning of the First Amendment, and seeking damages and injunctive relief.

The District Court entered findings of fact, concluded that the ordinance was constitutional, and granted a motion for summary judgment submitted by Los Angeles.

The Court of Appeals reversed, reasoning that the ordinance was presumptively unconstitutional on its face because significant First Amendment interests were involved, and that Los Angeles had not justified its total ban on all signs on the basis of its asserted interests in preventing visual clutter, minimizing traffic hazards, and preventing interference with the intended use of public property.

After careful consideration, we are of the opinion that the ordinance is not unconstitutional on its face. We are likewise of the opinion that it is not unconstitutional as applied to Taxpayers and COGS.

The First Amendment forbids the government to regulate speech in order to punish the speaker. This principle, however, is not applicable here, for there is not even a hint of punitiveness.

In sum and substance, the ordinance is a time, place, and manner restriction.

A time, place, and manner restriction is reasonable under the First Amendment if it (1) is justified without reference to the content of the regulated speech, (2) is narrowly tailored to serve a significant governmental interest, and (3) leaves open ample alternative channels for communication.

It is plain to us that the ordinance is indeed reasonable.

First, the ordinance is justified without reference to the content of the regulated speech. It has nothing to do with the content of any speech on any sign. It has everything to do with an attempt by Los Angeles to improve its appearance. Taxpayers and COGS concede as much.

Second, the ordinance is narrowly tailored to serve a significant governmental interest. Los Angeles has a weighty, essentially aesthetic interest in proscribing intrusive and unpleasant formats for expression. Its interest, as Taxpayers and COGS again concede, is basically unrelated to the

suppression of ideas. The problem addressed by the ordinance — the visual assault on residents presented by an accumulation of signs posted on public property — constitutes a significant substantive evil within the city's power to prohibit. Indeed, we so held in *Metromedia, Inc. v. City of San Diego* with respect to billboards on private property. The validity of Los Angeles' aesthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property. The private citizen's interest in controlling the use of his own property justifies the disparate treatment. There is no basis for any conclusion that the prohibition against the posting of the signs of Taxpayers and COGS fails to advance the city's aesthetic interest. The ordinance curtails no more expressive activity than is necessary to accomplish its purpose of eliminating visual clutter. By banning posted signs, the city did no more than eliminate the exact source of the evil it sought to remedy.

Third, the ordinance leaves open ample alternative channels for communication. Indeed, the District Court so found, with substantial evidence in support. While a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate, the ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited.

Although plausible policy arguments might well be made in support of the suggestion by Taxpayers and COGS that Los Angeles could have enacted an ordinance that would have had a less severe effect on expressive activity like theirs — such as by providing an exception for political campaign signs — it does not follow that such an exception is constitutionally mandated. Nor is it clear that such an exception would even be constitutionally permissible. To except political speech like that of Taxpayers and COGS and not other types of speech might create a risk of engaging in constitutionally forbidden content discrimination. The city may properly decide that the aesthetic interest in avoiding visual clutter justifies a removal of all signs creating or increasing that clutter.

The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

National Advertising Company v. City of Orange

United States Court of Appeals for the Ninth Circuit (1988)

Aiming at traffic safety and aesthetics, an ordinance of the City of Orange, California, bars off-site billboards, defined as "signs which direct attention to a business, commodity, industry or other activity which is sold, offered or conducted *elsewhere than on the premises upon which such sign is located*." (Italics added.) It excepts certain governmental signs, memorial signs, recreational signs, and temporary political, real estate, construction, and advertising signs. By contrast, it permits on-site billboards, defined as "signs which direct attention to a business, commodity, industry or other activity which is sold, offered or conducted *on the premises upon which such sign is located*." (Italics added.)

National Advertising ("National") applied for a permit to erect off-site billboards in Orange. Under compulsion of the ordinance, the city denied its application.

National filed suit in district court against Orange alleging that the ordinance was unconstitutional on its face and seeking declaratory and injunctive relief. It moved for summary judgment. The district court granted its motion. It declared the ordinance unconstitutional, and ordered the city to process National's application without regard thereto. The city appeals.

Orange interprets the ordinance to prohibit only off-site billboards relating to commercial activity. The plain language of the ordinance precludes this interpretation. The ordinance bans off-site billboards relating to a "business, commodity, industry *or other activity* which is sold, offered or conducted elsewhere than on the premises . . . ." The city interprets "activity" to mean only *commercial* activity. It is settled, however, that, in ordinances of this sort, "activity" is not so limited. The exceptions to the ban allowed in the ordinance reveal the lack of such a limitation. Indeed, many involve noncommercial activity. They would be rendered meaningless by the city's interpretation. We construe the ordinance as prohibiting *all* off-site billboards relating to activity not on the premises on which the sign is located, with the exceptions specified, and permitting *all* on-site billboards relating to activity on the premises. Whether the message on the billboards is commercial or noncommercial is irrelevant: both commercial and noncommercial messages are permitted if they relate to activity on the premises and prohibited if they do not.

Standards for assessing the constitutionality of billboard restrictions are found in the Supreme Court's opinions in *Metromedia, Inc. v. City of San Diego* and *City Council v. Taxpayers for Vincent*.

Under these standards, Orange's ordinance is valid as applied to billboards with commercial messages. The city may prohibit such billboards entirely in the interest of traffic safety and aesthetics, *Metromedia, Inc. v. City of San Diego*; *City Council v. Taxpayers for Vincent*; and may also

prohibit them except where they relate to activity on the premises on which they are located, *Metromedia, Inc. v. City of San Diego*.

Stricter standards apply to the restriction of billboards with noncommercial messages. Under *Metromedia, Inc. v. City of San Diego*, an ordinance is invalid if it imposes greater restrictions on billboards with noncommercial messages than on billboards with commercial messages, or if it regulates billboards with noncommercial messages based on their content. We need not decide whether the ordinance passes the first test, because it clearly fails the second.

Merely treating billboards with noncommercial messages and billboards with commercial messages equally is not constitutionally sufficient. The First Amendment affords greater protection to noncommercial speech than to commercial, *Metromedia, Inc. v. City of San Diego.* Regulations valid as to commercial speech may be unconstitutional as to noncommercial. *Ibid*.

Thus, under *Metromedia, Inc. v. City of San Diego*, although Orange may distinguish between the relative value of different categories of commercial speech, it does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests. The ordinance breaches this basic principle.

The exceptions to the ordinance's restrictions, like those before the *Metromedia* Court, require examination of the content of noncommercial messages. In most instances, whether off-site billboards with noncommercial messages are allowed turns on whether they convey messages approved by the ordinance.

The First Amendment forbids the regulation of noncommercial speech based on its content. Because the exceptions to the ordinance's restriction on noncommercial speech are based on content, the restriction itself is based on content.

The First Amendment might tolerate the regulation of noncommercial speech based on its content if the government were to establish that it is necessary to serve a compelling governmental interest and that it is narrowly drawn to achieve that end. Orange cannot do so. Its allowance of some off-site billboards with noncommercial messages is evidence that its interests in traffic safety and aesthetics, while substantial, fall shy of compelling.

Orange is not powerless to regulate off-site billboards with noncommercial messages. It remains free to redraft its ordinance to conform to the First Amendment by avoiding content-based distinctions in its treatment thereof.

The judgment is affirmed.

Desert Outdoor Advertising, Inc. v. City of Moreno Valley

United States Court of Appeals for the Ninth Circuit (1996)

The City of Moreno Valley has enacted an ordinance regulating billboards. The ordinance regulates both "off-site" and "on-site" billboards. Off-site billboards may include commercial or noncommercial messages. On-site billboards may contain only commercial messages. The ordinance imposes different restrictions on off-site and on-site billboards. As a general matter, an off-site billboard may be erected and maintained only if the Director of Public Works issues a permit after finding that the billboard will not have a harmful effect upon the health or welfare of the general public, will not be detrimental to the welfare of the general public, and will not be detrimental to the aesthetic quality of the community or the surrounding land uses. By way of exception, an off-site billboard may be erected and maintained without such a permit for official notices, directions, and signs for civic or fraternal organizations. An on-site billboard can always be erected and maintained without such a permit.

Threatened with administrative proceedings to compel the removal of off-site billboards that they erected and maintained without permits, Desert Outdoor Advertising, Inc. ("Desert") and Outdoor Media Group, Inc. ("OMG") filed this action against Moreno Valley in United States District Court, challenging the constitutionality of the ordinance under the First Amendment. The city moved for summary judgment. The district court granted the motion, and rendered judgment accordingly. Desert and OMG now appeal.

Desert and OMG contend that the ordinance violates the First Amendment in its permit requirement because it gives unbridled discretion to Moreno Valley's Director of Public Works.

Under the ordinance, a person must generally obtain a permit from the Director of Public Works before erecting an off-site billboard. The Director has discretion to deny a permit on the basis of ambiguous and subjective reasons — for example, that the billboard will have a harmful effect upon the health or welfare of the general public *or* will be detrimental to the welfare of the general public *or* will be detrimental to the aesthetic quality of the community or the surrounding land uses.

But any law — including the ordinance here challenged — that subjects the exercise of First Amendment freedoms to the prior restraint of a permit, without narrow, objective, and definite standards to guide the permitting authority, is violative of that amendment.

The ordinance contains no limits on the authority of Moreno Valley's Director of Public Works to deny a permit for an off-site billboard. The Director has unbridled discretion in determining whether a particular billboard will be harmful to the community's health, welfare, or aesthetic quality. Moreover, the Director can deny a permit without offering any evidence to support the conclusion that a particular billboard is detrimental to the community. Moreno Valley claims that the Director's discretion in this regard is no more problematic than that of all such officials who must review and approve a billboard's

design in order to determine whether it is consistent with its surroundings in size, shape, color, and placement. We disagree. Over the years, design review and approval has given rise, in practice, to standards that have become known to both regulating and regulated parties, and that have generally been applied without substantial controversy. The fact is proved by the presence in many ordinances of provisions simply subjecting billboards to design review and approval for "consistency with their surroundings in size, shape, color, and placement," without more — and by the absence of any significant litigation challenging the lawfulness of such review and approval. There are no such standards, however, to guide the Director in determining whether a particular billboard will be harmful to the community's health, welfare, or aesthetic quality. Thus, we conclude that the ordinance violates the First Amendment in its permit requirement.

Desert and OMG next contend that the ordinance violates the First Amendment as an undue regulation of commercial speech.

To be valid under the First Amendment, as *Metromedia, Inc. v. City of San Diego* holds, an ordinance that regulates commercial speech must (1) serve a substantial governmental interest, (2) directly advance such interest, and (3) be no more extensive than necessary.

As the party seeking to regulate commercial speech, Moreno Valley has the burden of establishing that the ordinance meets each of these three elements.

Desert and OMG argue that Moreno Valley has failed to carry its burden as to the existence of a substantial governmental interest. We agree.

Although aesthetics and safety represent substantial governmental interests, as the court in *Metromedia, Inc. v. City of San Diego* made plain, in this case, Moreno Valley has not established that it enacted the ordinance to further any such interests. It did not incorporate any statement of purpose concerning either interest in the ordinance. Furthermore, it did not provide any evidence that the ordinance actually promotes either one.

Desert and OMG also contend that the ordinance violates the First Amendment because it imposes greater restrictions on billboards with noncommercial messages than on billboards with commercial messages.

Under *Metromedia, Inc. v. City of San Diego*, as we ourselves held in *National Advertising Co. v. City of Orange*, an ordinance is indeed invalid if it imposes greater restrictions on billboards with noncommercial messages than on billboards with commercial messages. We find the ordinance wanting in this respect.

Under the ordinance, off-site billboards, which alone may include noncommercial messages, generally need a permit by the Director of Public Works, whereas on-site billboards, which may include only commercial messages, do not.

Desert and OMG then contend that the ordinance violates the First Amendment because it regulates billboards with noncommercial messages based on their content.

Here too, under *Metromedia, Inc. v. City of San Diego*, as we ourselves held in *National Advertising Co. v. City of Orange*, an ordinance is indeed invalid if it regulates billboards with noncommercial messages based on their content. We find the ordinance wanting in this respect as well.

Under the ordinance, an off-site billboard, which alone may include noncommercial messages, cannot be erected and maintained without a permit by the Director of Public Works — except for official notices, directions, and signs for civic or fraternal organizations. Because the ordinance effectively requires the Director to examine the content of the billboard to determine whether or not it is excepted, its regulation of any noncommercial speech is content-based.

The ordinance might be saved in spite of its content-based regulation if Moreno Valley could establish that it is necessary to serve a compelling governmental interest and that it is narrowly drawn to achieve that end. The city cannot do so. It failed to present any evidence that the ordinance promoted a substantial governmental interest, much less a compelling one.

The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

THURSDAY AFTERNOON
AUGUST 1, 2002

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

U.S. v. ALEJANDRO CRUZ

U.S. v. ALEJANDRO CRUZ

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work, a **File** and a **Library**. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
4. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
6. Although there are no restrictions on how you apportion your time, you

should probably allocate at least 90 minutes to organizing and writing.

7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of your response. Grading of the two tasks will be weighted as follows:

Task 1 — 70%

Task 2 — 30%

Law Offices of
Miles, Read and Paulete
605 Crawford Street
Carpenter, Columbia

M E M O R A N D U M

To: Applicant

From: Matt Mato

Re: U.S. v. Alejandro Cruz

Date: August 1, 2002

Our client, Alejandro Cruz, is threatened with criminal prosecution by the United States Department of the Treasury's Office of Foreign Assets Control (OFAC) following a trip to Cuba. OFAC has sent Mr. Cruz a letter requesting information concerning a possible criminal violation of Section 515.201 of the Trading With the Enemy Act.

1. Prepare a memorandum for me that (a) identifies the elements of a criminal violation of Section 515.201 of the Trading With the Enemy Act, (b) indicates the evidence the government now possesses to establish each element, and (c) determines whether the government may constitutionally use the presumption contained in the Trading With the Enemy Act at any ensuing criminal trial.

2. Prepare a memorandum for me on the ethical considerations that I must take into account as I undertake to draft a letter on Mr. Cruz's behalf in response to OFAC's request for information. As you will see, the request inquires into such matters as travel-related transactions, licenses, and fully-hosted travel. As you will also see, Mr. Cruz has provided us with much information relating to such matters, and has provided it quite candidly. Please tell me what I am ethically required or allowed to say, or not to say, in response to the request, and give me your reasons.

TRANSCRIPT OF
ALEJANDRO CRUZ INTERVIEW

Matt Mato: OK, Alejandro, it was good to catch up on what you've been doing since we were in the Peace Corps in Nepal.

Alejandro Cruz: Indeed it was, Matt.

MATO: Well, let's get to work. We've covered the basics, costs, retainer, and information that you and I will need to keep in touch. So, as I told you, I've turned on the tape recorder to get the full story. Do you have any questions before we start?

CRUZ: I don't think so. This whole thing is overwhelming. I don't feel that I'm on familiar or solid ground. I went on a tropical vacation and now I'm facing fines of six figures and even prison.

MATO: I'm sure it is a shock. Thanks for the documents you've brought. We'll go over them in a minute. Let's go back to what's happened and start at the beginning.

CRUZ: Certainly. About a year ago, I began looking at a trip to Cuba. I was reading a lot of news stories about Cuba. There was the Pope's visit in 1998, the 40th anniversary of Castro's revolution the next year, and then all the news coverage on the little boy, Elían González, who was the center of the controversy involving Cuban-Americans in Miami. For a couple of years, it's seemed as though there was a news story every week about Cuba. I was curious about Cuba, and frankly I wanted to learn for myself what was left of communism in the 21st century. I'm not of Cuban extraction myself, but I was interested.

MATO: Would it be fair to say that as a result of the news coverage you were aware of the U.S. embargo?

CRUZ: Yes. For example, in 2000 there were many stories about the possibility of the U.S. easing the embargo against the sale of food and medicine to Cuba, even though it didn't actually succeed. I definitely recall reading those with interest.

Running my own business, I couldn't believe that the United States Congress would prohibit U.S. farmers from selling their agricultural commodities to Cubans.

MATO: So you knew about the legal problems of going to Cuba before you went?

CRUZ: Let me think about that. There was extensive coverage on doing business with Cuba, for example, comparing the conflicting U.S. policies toward China and Vietnam and toward Cuba, but I can't recall ever reading about the travel restrictions. I don't think that many people in America realize that a trip to Cuba could land them in federal prison for 10 years.

MATO: So you knew about the trade embargo, but perhaps not about the travel restrictions?

CRUZ: I think that I discovered those only after I decided to go, and began doing research on traveling there.

MATO: What did you do?

CRUZ: I went to a bookstore and checked out the Internet. All the major guidebook publishers have guides to Cuba. I scanned many of them, and finally chose the Freedom one, probably because I've liked using their guides on trips to Latin America.

MATO: That's the guidebook you've shown me?

CRUZ: Yes.

MATO: So, before going, how would you describe your understanding of the legality of traveling to Cuba?

CRUZ: That it was illegal, but that the travel restrictions were a relic of the long dead and buried Cold War, that thousands of Americans were going, and there was no punishment, not even a slap on the wrist. Everyone seemed to be going. I had received announcements of organized tours from my university alumni association.

MATO: Did you keep any of them?

CRUZ: I don't think so. No, I didn't. I preferred to go on my own, traveling

independently rather than on a packaged tour. Perhaps that was a mistake. Are the tours legal?

MATO: I really don't know. So would it be fair to say that you understood that without some kind of permission, a license I think it says, it was illegal to go?

CRUZ: Yes.

MATO: You knew the rules, you just did not think that there would be any consequences?

CRUZ: Yes, and, I guess, that it was so commonplace, that I would not be caught.

MATO: So how did you go?

CRUZ: I followed the guide's instructions. I booked flights to Montego Bay and then to Havana. It's very easy to do on the Internet, except that you can't pay for the flight to Havana with a U.S. credit card. Only cash is accepted, but it's easy. It's the same in Cuba. You cannot use your American credit card, but the dollar is the common currency. There's no need to change any money for Cuban pesos.

MATO: How long were you there?

CRUZ: Two weeks.

MATO: Any idea what you spent?

CRUZ: Less than $2,000, including airfare.

MATO: What was that for?

CRUZ: Hotel rooms, meals, and transportation basically.

MATO: Again, is it fair to say that those were the kinds of expenditures that you believed were prohibited?

CRUZ: Pretty much. I just did not think it mattered to anyone.

MATO: Any records of your expenditures?

CRUZ: I can't recall any that I retained.

MATO: So, when you came back to the U.S., what happened?

CRUZ: I was not even thinking that there would be a problem. I took a few precautions, and then forgot about it until I was suddenly searched and given the "third degree" by Customs.

MATO: What precautions?

CRUZ: I stashed the Cuban cigars and rum I'd bought. And I removed the baggage tags from the flights to and from Havana.

MATO: But they found the cigars and rum?

CRUZ: Just bad luck to be the one they picked out to search. As I said, I was not prepared for it. I tried to think of an explanation, but I did not do it very well. The Customs guy could tell I wasn't being straight.

MATO: That comes through in his report.

CRUZ: I felt that he could see right through me. I finally decided to tell him the truth: I had been to Cuba. And then not say anything else. At least I had the presence of mind to remember that from the guidebook.

MATO: I don't know how this is going to turn out, Alejandro, but I think that you made the right decisions on both counts. Is the inspector's report accurate?

CRUZ: It embarrasses me to say that it is. He probably could have put in some more shuddering and stammering while I tried to think of something to say. I don't think that I raised my voice as he claims, but I did go through a phase of being angered that I was caught, because I recalled reading of Little Leaguers being able to get away with going to Cuba. I guess I thought of myself as an experienced world traveler, and I felt very foolish.

MATO: Then what?

CRUZ: I thought that giving up 70 or 80 dollars worth of cigars and rum at the airport was the end of it. That's ironic: I bought them on the black market, so the money did not go to the Cuban government, but to some Cuban undercutting the government

stores.

MATO: Then what? You received the letter from OFAC?

CRUZ: Yes, the "Request to Furnish Information" from a "Sanctions Coordinator." That is when I decided that this was getting out of control and called you.

MATO: This is obvious, but I assume that you don't have one of the licenses mentioned in the OFAC request?

CRUZ: No. I do not know who gets them or how. Although I guess the tour companies have that figured out.

MATO: Probably. I notice that OFAC has to ask if you have a license. But I guess that's what they're stuck with. They can't send the FBI to Cuba to prove that you committed a crime. Are these then the only documents you have?

CRUZ: Yes. It's my entire Cuba file, guidebook and all.

MATO: I'll look them over. As I said, the Trading With the Enemy Act is not something I'm familiar with, so I'll probably ask one of our associates to look into it. We will probably want to respond in some way to the request, since criminal sanctions are being threatened. We'll draft something and be in touch.

CRUZ: Thank you.

* * * * * * *

CHAPTER 4

The Choice For Americans: Licensed or Unlicensed Travel

Travel to Cuba itself is not difficult, but it is very difficult to understand or reconcile the technicalities and the realities of travel to Cuba. For those not interested in tackling the details of the grotesquely named Trading With the Enemy Act or licenses to qualify for legal travel to Cuba, these key facts may be sufficient:

- Thousands of Americans, perhaps 200,000, are illegally traveling to Cuba annually through Canada, Mexico, and the Caribbean.
- Many other Americans are going legally on tours for apparent educational, religious, and cultural purposes.
- Despite the flow of travelers, prosecution by U.S. authorities for violating the travel ban is rare.

Although there is a travel ban, it is flouted with impunity by thousands, and unevenly and inconsistently applied by the United States.

To begin with, what is legal or permitted involves TWO governments: the U.S. and Cuba. So, when one asks, “What is allowed?” The answer may be, “According to whom, the U.S. or Cuba?”

On the Cuban side, the situation is much clearer. Cuba welcomes tourists, including those from the United States. (An exception is returning Cuban-Americans whose right to return is tightly regulated.) The Cuban government wants tourists to come and spend money. Cuban airport immigration officials facilitate U.S. tourism and usually will not stamp American passports. In general, travel to and within Cuba is not restricted, although there are many harsh, incomprehensible restrictions on the Cubans with whom tourists may travel, stay, and

eat.

In terms of U.S. law, travel to Cuba is either (1) legal, more accurately "licensed," or (2) illegal, that is, "unlicensed." From this point on, the rules get complicated and arbitrary, and even simple rules are inconsistently and sometimes inexplicably applied.

Contrary to popular belief, U.S. law does not technically prohibit U.S. citizens from visiting Cuba. However, tourism is effectively banned by the U.S. embargo, which prohibits U.S. citizens or residents from spending any money there to rent a room, buy a meal, or use transportation, or buying anything from or selling anything to Cuba, and threatens those who do so with 10 years imprisonment and fines of $100,000 for individuals and $1,000,000 for businesses. The law does not allow minimal travel-related transactions or minor purchases. Any amount is unlawful. Do not try to tell Customs that you stayed in a cheap hotel or bought only one box of cigars. You will only be getting yourself into more trouble.

The trade embargo and travel restrictions are rooted in the Trading With the Enemy Act, which, in effect, puts Cuba in the category of Iraq, Libya, and North Korea. It authorizes the President to prohibit or regulate trade with hostile countries **in time of war**. According to a 1998 Pentagon report, Cuba poses no national security threat, and its military capabilities are only defensive. The State Department says that Cuba no longer actively supports armed struggle in Latin America or elsewhere. Nevertheless, U.S. Presidents, both Democrats and Republicans, annually sign declarations putting Cuba in the official and legal category of an enemy. There was a brief opening of travel to Cuba in the 1970s, but ever since President Reagan reimposed the prohibition on travel-related transactions in Cuba, it has been practically illegal to travel to Cuba.

The legal prohibition is about controlling dollars; thus, enforcement and applications for licenses to travel to Cuba are handled by the U.S. Treasury Department, not the State Department. Specifically, it is the Office of Foreign Assets Control (OFAC), U.S. Department of the Treasury, Washington, D.C., telephone (202) 622-2520.

The U.S. sanctions for unlicensed travel to Cuba **are not limited** to U.S. citizens. Any

person subject to U.S. jurisdiction who engages in any travel-related transaction in Cuba violates the law. Thus, foreign nationals who are U.S. residents should also not risk a Cuban entry stamp in their foreign passports.

Although it is possible to travel to Cuba through a third country, such as Canada or Mexico, the circuitous route is not legal. However, if a traveler can prove that she or he did not spend any money in Cuba, then travel there may be legal. One of the categories of legal travel has been "fully-hosted travel"; that is, trips where the Cuban government or some non-U.S. organization picks up all travel expenses in Cuba. "Venceremos Brigades" used to go (and perhaps still do) to help the Revolution cut sugar cane. The Cuban government continues to operate fully-hosted trips, which reportedly are long on indoctrination and short on food and amenities. The U.S. government will not just take your word that you were "fully-hosted." You will be asked to provide a day-to-day explanation of who paid for your meals, lodging, transportation, and even gratuities.

Other than a "fully-hosted" visit, U.S. law permits only a few categories of "licensed" travel, such as to gather news or attend professional conferences and athletic competitions. "General" licenses are available to diplomats, full-time journalists, and full-time academic researchers. Everyone else must apply for and obtain a "specific license." These include religious organizations, human rights groups, and projects to directly benefit the Cuban people.

The largest category of licensed travel comprises Cubans in the U.S. who are permitted, once a year, to visit close relatives in "humanitarian need." One of the ironies of the Elían González saga is that if Congress had succeeded in making Elían a U.S. citizen or resident, he could have visited his own father only once a year and only if there was a humanitarian need.

The U.S. travel restrictions state repeatedly that all tourism or recreational travel is prohibited. However, in fact and in law, it is not so. A fully-hosted trip can be totally recreational; a Cuban who legally visits family in Cuba is free to engage in recreation.

Furthermore, in the last few years, there has been a steady flow of celebrities, tour groups, and just plain tourists going to Cuba. For example, newspapers and the

Web have reported that visitors to Cuba have included:

- 60 Baltimore Little Leaguers;
- Basketball coach Bobby Knight, to fly fish and conduct basketball clinics;
- Delegations from the U.S. Chamber of Commerce (even though U.S. businesses cannot do business there).

U.S. travel companies advertise apparently legal trips for cigar aficionados, photo enthusiasts, and music and dance fanatics. The National Geographic Society and many cultural, alumni, senior, and even veteran's groups run cultural trips to Cuba; yet U.S. law does not include an exception for cultural travel. One U.S. company advertises trips to Cuba's nightlife and beaches. These licensed trips would seem to be recreational.

In total, somewhere between 160,000 to 300,000 U.S. citizens visit Cuba annually; only about 100,000 do so legally, while the rest slip in through third countries. Going through Canada, Mexico, or the Bahamas is not legal, of course, but thousands of Americans do it annually.

Prosecutions are rare, although they do occur. If you are caught, do not lie, but do not admit that you bought anything in Cuba or that you spent any money in Cuba.

FREEDOM'S CARIBBEAN: THE CHOICE FOR AMERICANS

DEPARTMENT OF THE TREASURY
Office of Foreign Assets Control
WASHINGTON, D.C.

OFAC No. 02-53-0798

July 26, 2002

Alejandro Cruz
463 Cespedes
San Cabo, Columbia 60001

Request to Furnish Information Regarding Possible Criminal Violation of Section 515.201 of Trading With the Enemy Act

Dear Mr. Cruz:

This is in reference to your entry into the United States on July 2, 2002 at San Cabo International Airport, State of Columbia. At that time, you acknowledged to a Customs Service Inspector that you had been to Cuba. The Customs Report is enclosed.

Section 515.201 of the Trading With the Enemy Act, administered by the Office of Foreign Assets Control (OFAC) of the United States Department of the Treasury, prohibits all persons subject to the jurisdiction of the United States from travel-related transactions in Cuba, unless authorized under a license.

The Trading With the Enemy Act provides that, unless otherwise authorized, any person subject to the jurisdiction of the United States who has traveled to Cuba shall be presumed to have engaged in prohibited travel-related transactions. This presumption may be rebutted by a statement signed by the traveler providing specific supporting documentation showing that (1) no transactions were engaged in by the traveler or on the traveler's behalf by other persons subject to the jurisdiction of the United States, or (2) the traveler was fully-hosted by a third party not subject to the jurisdiction of the United States, and payments made on the traveler's behalf were

not in exchange for services provided to Cuba or any national thereof.
Accordingly, would you provide to this Office a signed statement under oath explaining whether you engaged in travel-related transactions in Cuba pursuant to a license? If you claim to have traveled pursuant to a license, provide documentation of the purpose and activities of your travel to Cuba; provide the number, date, and name of the bearer of the license; and, if still in your possession, provide a copy of the license itself.

If you claim not to have engaged in travel-related transactions in Cuba, provide a statement under oath describing the circumstances of the travel and explain how it was possible for you to avoid entering into travel-related transactions such as payments for meals, lodging, transportation, bunkering of vessels, visas, entry or exit fees, and gratuities.

If you claim to have been a fully-hosted traveler to Cuba, provide a statement under oath describing the circumstances of the travel and explain how it was possible for you to avoid entering into travel-related transactions such as payments for meals, lodging, transportation, bunkering of vessels, visas, entry or exit fees, and gratuities. The statement should also state what party hosted the travel and why. The statement must provide a day-to-day account of financial transactions waived or entered into on behalf of the traveler by the host, including but not limited to visa fees, room and board, local or international transportation costs, and Cuban airport departure taxes. It must be accompanied by an original signed statement from the host, confirming that the travel was fully-hosted and the reasons for the travel.

Since there is no question that you traveled to Cuba, the failure to establish that your travel was pursuant to a license, or that there were no travel-related transactions in Cuba, or that you were a fully-hosted traveler, could result in a criminal prosecution for violation of the Trading With the Enemy Act.

Your response should be mailed within 10 days to: Sanctions Coordinator, OFAC, U.S. Department of the Treasury, Washington, D.C.

OFFICE OF FOREIGN ASSETS CONTROL

Clara Charles
Washington Sanctions Coordinator

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE

Report (Customs Form 110 A)

Case No. CS: 02-53-0798

Report Type: Seizure/Forfeiture of Cuban-origin commodities

Officer's Name Badge: Customs Inspector Paul Nardella, #26262

Office/Location: San Cabo International Airport, State of Columbia

Report Date/Time: July 2, 2002, 3 p.m.

Suspect/Victim/Reporting Party: Alejandro Cruz, U.S. Passport #0534123132.

Address: 463 Cespedes, San Cabo, Columbia 60001 Telephone: (301) 703-6034

DOB: 3/30/66, Falls Church, Columbia. M. Cauc, 5-9, 160, Brn eyes

Seized or Forfeited Property: 2 boxes, 25 cigars each of Cohiba Esplendidos. 1 box, 25 cigars of Cohiba Habanos. Total 75 cigars. 2 bottles Havana Club Anejo Reserva Rum. 5 "Che" key chains. One Cuban 3-peso coin.

Action Taken: Forfeiture of Cuban-origin commodities and referral to OFAC, Washington Office.

Narrative: On date of report, Customs Inspector (CI) Nardella was assigned to an Inspector's secondary examination station, San Cabo Customs. Alejandro Cruz was selected for a random inspection by a roving inspector and referred to CI's inspection station. Passport in order. Entry and exit stamps from Jamaica, Montego Bay, in accord with Customs Declaration (Form 6059B), listing arrival on Air Jamaica # 666. No entry or exit stamps indicating travel to Cuba. Passport not retained. No commodities declared. CI asked Cruz if he had anything to declare. Cruz responded no. "No tobacco or alcohol products?" CI asked. Cruz again responded no. CI performed hand search of luggage. Discovered Cuban-origin commodities listed above wrapped in dirty clothing and stuffed inside an empty camera bag. CI asked Cruz why he had not listed the commodities on Customs Declaration. Cruz said that he estimated that they were within $400 duty-free exemption and it was not necessary to write in. CI responded that that is correct if items are orally declared. Cruz responded, "That's been done now, right?" CI responded that was correct but these are Cuban-origin commodities. Cruz volunteered that he had bought the Cuban-origin commodities in Jamaica, so he did not

believe that they "were a problem with the Cuba embargo." CI responded, "So you did not buy these commodities in Cuba?" Cruz said, "No. I bought them in the duty-free store leaving Montego Bay, Jamaica." (This Customs Officer has observed the same items carried by passengers coming from Montego Bay.) CI informed Cruz that it did not matter where he bought them, as U.S. law does not permit the importation of Cuban-origin commodities even if purchased in another country. CI informed Cruz that Cuban-origin commodities would have to be seized and that unless he was licensed to import or transport Cuban-origin commodities, he would be required to forfeit the Cuban-origin commodities. CI informed Cruz that he would have to wait while CI filled out a Seizure Report identifying the Cuban-origin commodities. Cruz was observed to be agitated and nervous. Cruz volunteered that he "misspoke." He had not bought the items. They were gifts. He said several times, "I did not pay for them." Cruz said he had read that the U.S. embargo of Cuba was "over." CI asked Cruz where he'd read that, and Cruz said, "Right here," waving a copy of the Freedom's Caribbean he was carrying. Cruz said that he read that no one had ever been prosecuted for violating the embargo. "Why did you single me out?" Cruz said in a raised voice. CI responded by asking Cruz to calm down. CI said that he thought that Cruz said he had not been to Cuba. Cruz responded, "I did not spend any U.S. dollars" on the Cuban-origin commodities. CI responded OK, that he would put on the seizure form that the commodities had not been purchased in Cuba and that Cruz had not been in Cuba. Cruz responded the CI had "misunderstood me. I was in Cuba. I received the cigars as gifts in Cuba." CI inquired what Cruz was doing in Cuba. Cruz responded that he thought he "better not say anything else." Thereafter Cruz refused to respond and repeated that he "better not say anything else." CI explained to Cruz that not all travel to Cuba was prohibited, that if he was in a category that qualified for a general license he could travel there and bring into the U.S. up to $100 worth of Cuban-origin commodities. CI explained that if he had family members in Cuba or was a journalist or a professor working in Cuba he could bring in the Cuban-origin commodities. CI asked Cruz whether he had traveled to Cuba as part of a specific license held in the name of another, such as an educational or professional tour. Cruz's response to each of these suggestions was that he "better not say anything else." CI offered Cruz the opportunity to talk to a Custom Service supervisor-on-duty if he wanted to explain his presence in Cuba. Cruz declined. CI explained process to reclaim property or accept forfeiture. Cruz said, "Keep it. You and your buddies can enjoy the cigars." CI informed Cruz that the contraband would be smoked — in the Customs Service incinerators.

THURSDAY AFTERNOON
AUGUST 1, 2002

California
Bar
Examination

Performance Test B

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U.S. v. ALEJANDRO CRUZ

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SELECTED PROVISIONS OF THE TRADING WITH THE ENEMY ACT

* * *

Section 515.201. Transactions involving designated foreign countries or their nationals.

(a) All of the following transactions are prohibited, except as authorized by the Secretary of the Treasury by means of licenses, if such transactions involve money or property in which any foreign country designated under this section, or any national thereof, has any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any money, property, or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

(2) All transfers outside the United States with regard to any money, property, or property interest subject to the jurisdiction of the United States.

(b) For the purposes of this section, and subject to the President's declaration, the term "foreign country designated under this section" includes . . . Cuba . . . .

(c) Any person subject to the jurisdiction of the United States who engages in any of the foregoing transactions is in violation of this section and is subject to civil action and remedies and, if such person engages in any such transaction willfully, to criminal prosecution and sanction.

* * *

Section 515.420. Fully-hosted travel to Cuba.

A person subject to the jurisdiction of the United States who is not authorized to engage in travel-related transactions in which Cuba has an interest will not be considered to violate the prohibitions of Section 515.201 when a person not subject

to the jurisdiction of the United States covers the cost of all transactions related to the travel of the person subject to the jurisdiction of the United States.

Section 515.421. Presumption of travel-related transactions.

Unless otherwise authorized, any person subject to the jurisdiction of the United States who has traveled to Cuba shall be presumed to have engaged in travel-related transactions prohibited by Section 515.201. This presumption may be rebutted by a statement signed by the traveler providing specific supporting documentation showing that no transactions were engaged in by the traveler or on the traveler's behalf by other persons subject to the jurisdiction of the United States or showing that the traveler was fully-hosted by a third party not subject to the jurisdiction of the United States and that payments made on the traveler's behalf were not in exchange for services provided to Cuba or any national thereof. The statement should address the circumstances of the travel and explain how it was possible for the traveler to avoid entering into travel-related transactions such as payments for meals, lodging, transportation, bunkering of vessels, visas, entry or exit fees, and gratuities. If applicable, the statement should state what party hosted the travel and why. The statement must provide a day-to-day account of financial transactions waived or entered into on behalf of the traveler by the host, including but not limited to visa fees, room and board, local or international transportation costs, and Cuban airport departure taxes. Travelers fully-hosted by a person or persons not subject to the jurisdiction of the United States must also provide an original signed statement from their sponsor or host, specific to that traveler, confirming that the travel was fully-hosted and the reasons for the travel.

* * *

SELECTED COLUMBIA RULES OF PROFESSIONAL CONDUCT

* * *

Rule 3.21. Meritorious claims and contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding may nevertheless so defend the proceeding as to require that every element of the case be established. A lawyer for a person who may become subject to a criminal proceeding may decline to aid in the investigation of the case.

* * *

RULE 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a contemporaneous or future criminal act by a client, unless disclosure would reveal confidential information obtained from the client and the criminal act in question is not likely to result in imminent death or substantial bodily harm.

COMMENT

Misrepresentation. A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.

Confidential Information. A lawyer is generally under a duty to preserve client confidences. A lawyer is also generally required to be truthful to others. Rule 4.1(b) effects an accommodation between the general requirement of truthfulness to others

and the general duty to preserve client confidences.

* * *

SANDSTROM v. MONTANA
Supreme Court of the United States, 1979

Defendant had confessed to the slaying of Annie Jessen. In a Montana state court prosecution for deliberate homicide, defendant's attorney informed the jury that, although defendant client admitted killing Jessen, he did not do so "purposely or knowingly," and was therefore not guilty of "deliberate homicide" but of a lesser crime. Defendant presented no evidence. At the prosecution's request, the trial court instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The jury found defendant guilty of deliberate homicide. Defendant, who was 18 at the time, was sentenced to 100 years in prison. The Montana Supreme Court affirmed, and certiorari was granted.

The question presented is whether, in a case in which intent is an element of the crime charged, the jury instruction, "the law presumes that a person intends the ordinary consequences of his voluntary acts," violates the requirement of the Fifth and Fourteenth Amendments' due process clauses that the prosecution prove every element of a criminal offense beyond a reasonable doubt. We hold that it does and reverse.

The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes. Defendant's jurors were told that "the law presumes that a person intends the ordinary consequences of his voluntary acts." They were not told that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory, as "conclusive," that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted

the instruction as a direction to find intent upon proof of defendant's voluntary actions (and their "ordinary" consequences), unless *defendant* proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence — thus effectively shifting the burden of persuasion on the element of intent. Numerous federal and state courts have warned that instructions of the type given here can be interpreted in just these ways. Although the Montana Supreme Court held to the contrary in this case, Montana's own Rules of Evidence expressly state that the presumption at issue here may be overcome only "by a preponderance of evidence contrary to the presumption." Such a requirement shifts the ultimate burden of persuasion on the issue of intent.

> In *In re Winship* (U.S. Supreme Ct. 1979), we stated:
>
> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clauses of the Fifth and Fourteenth Amendments protect the accused against conviction except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged.

We do not reject the possibility that some jurors may have interpreted the challenged instruction as permissive, or, if mandatory, as requiring only that defendant come forward with "some" evidence in rebuttal. However, the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that defendant's jurors actually did proceed upon one or the other of these latter interpretations.

Thus, the question is whether the challenged instruction had the effect of relieving the prosecution of the burden of proof enunciated in *Winship* on the critical question of defendant's state of mind.

We conclude that under either of the two possible interpretations of the instruction set out above, precisely that effect would result, and that the instruction therefore represents constitutional error, which on the facts presented must be deemed prejudicial.

Reversed.

BUSTOS v. IMMIGRATION AND NATURALIZATION SERVICE
United States Court of Appeals, Fifth Circuit, 1990

Pedro Bustos appeals from the Board of Immigration Appeals' final order of deportation. Because the immigration judge did not err in admitting an Immigration and Naturalization Service (INS) Form I-213, Record of Deportable Alien, and because Bustos did not refute any of the statements in the form which were sufficient for a prima facie showing of deportability, we affirm.

At the deportation hearing, Bustos identified himself, but refused to plead to the order to show cause and refused to answer the immigration judge's questions. The INS submitted a Form I-213 Record of Deportable Alien relating to a Pedro Bustos, which stated that he is a native and citizen of Mexico who had been in the United States since 1981. Attached to the form is an attestation by the INS's trial attorney that it is authentic and a true and correct copy of the original document taken from the INS's files. No further evidence was presented, and the judge found Bustos deportable.

We must decide whether the information in Form I-213 is by itself sufficient to make a prima facie showing of deportability, requiring the alien to produce evidence of legal presence in this country.

First, it is well established that a deportation hearing is a purely civil proceeding and that the alien is not entitled to all the constitutional safeguards of a criminal defendant.

Nonetheless, due process standards of fundamental fairness extend to the conduct of deportation proceedings. The test for admissibility of evidence in a deportation proceeding is whether the evidence is probative and whether its use is fundamentally fair. The affidavit of the examining officer shows that the information in the Form I-213 is based upon statements of Bustos, and Bustos does not contest their validity.

Although the government has the ultimate burden of proving deportability by

clear and convincing evidence, in a deportation case charging deportability of an alien who entered the country without inspection, the government need only show alienage.

> 8 U.S.C. §1361 provides in pertinent part:
>
> In any deportation proceeding, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States . . . . If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.

Thus, 8 U.S.C. §1361 imposes a statutory presumption that the alien is in the country illegally, and that the burden shifts to the alien to prove that he is here legally.

Once the form was properly admitted, the INS's prima facie case of deportability was made. The burden of proof then shifted to Bustos. No abridgement of his constitutional rights was involved in imposing that burden on him.

Affirmed.

UNITED STATES v. FRADE
United States Court of Appeals, Eleventh Circuit, 1985

Father Joe Morris Doss, Rector of Grace Episcopal Church in New Orleans, and Father Leopold Frade, Curate of Grace Episcopal Church and Chairman of the National Commission for Hispanic Ministry, appeal their convictions for criminal violation of Section 515.415 of the Trading With the Enemy Act (TWEA). This provision makes unlawful any transaction "when in connection with the transportation of any Cuban national . . . unless otherwise licensed." The prohibited transactions included "transportation by vessel," the "provision of any services to Cuban nationals," and "any other transactions such as payment of port fees and charges in Cuba and payment for fuel, meals, lodging."

The events giving rise to the convictions are those of the now famous Mariel boatlift, or freedom flotilla, of spring 1980, by which some 114,000 Cuban refugees, in nearly 1,800 boats, crossed the 90 miles of ocean and great political divide between Cuba and the United States. In early April 1980, some 10,800 Cuban citizens claiming status as political refugees sought sanctuary in the Peruvian Embassy in Havana. On April 14, 1980, President Carter declared that up to 3,500 of these refugees would be admitted into the United States. An airlift was started, but within three days Castro stopped the flights, announcing that anyone who wanted to leave could do so through the harbor of Mariel. Almost immediately, small boats, funded by the members of the Cuban-American community, began leaving Key West.

Cuban-American parishioners of Grace Church implored Fathers Frade and Doss to help in arranging for a boat to bring their relatives from Cuba. A meeting held by the priests at Grace Church on May 3 to organize the rescue mission was attended by 650 people and met with immediate overwhelming response. Within forty-eight hours, $215,000 was raised.

Fathers Frade and Doss commenced negotiations with the Interest Section of the Cuban Government in Washington to obtain the release of family members and political prisoners. They obtained assurances that they would not be forced to bring

back criminals, the mentally ill, or other undesirables that the Cuban government was then forcing into the Mariel boatlift. The Cuban Interest Section insisted that Fathers Frade and Doss turn over the list of the people they proposed to pick up. The priests submitted a list of 366 names which were immediately telexed to Havana. Although Fathers Frade and Doss understood that, in the week following their meeting at the Cuban Interest Section, the Administration's attitude towards the boatlift had changed, they realized that, once the names had been telexed, they had passed the point of no return. Father Frade had been told by a Cuban official that a "national purge was taking place," those applying for permission to leave Cuba were losing jobs, houses, and ration cards, and sometimes being attacked, beaten and killed. As the district judge observed at sentencing, "Once the list of names had been given over to the Cuban officials . . . it would have been very difficult, a very difficult decision of conscience to stop at that time."

On May 26, 1980, the *God's Mercy,* a large, safe vessel, equipped with $10,000 in added safety equipment, and manned by an experienced crew, including a doctor and a nurse, set sail for Mariel. After two weeks of intense negotiation, Fathers Frade and Doss succeeded in obtaining commitments to release the persons on their lists. On June 12, 1980, the *God's Mercy* arrived in Key West, with the priests and 402 refugees including 288 persons from the lists.

The *God's Mercy* was escorted into Key West by two Coast Guard cutters. Fathers Frade and Doss were arrested immediately, and the indictment under the TWEA was brought. After trial, Fathers Frade and Doss received $431,000 in fines and the *God's Mercy* was forfeited to the government.

Fathers Frade and Doss contend that the trial court erred in denying their motion for judgment of acquittal on the ground that there was no evidence to establish the requisite mental state for a criminal violation of Section 515.415 of the TWEA.

To be criminal, violation of the TWEA must be "willful." "Willfulness" is expressly required in some provisions of the act, such as Section 515.201, and impliedly required in the rest, including Section 515.415, with which we are concerned here. When used in a criminal statute, the word "willfully" generally

connotes a voluntary breach of a known legal duty. Section 515.415, under which the priests were convicted, was enacted into its operative form unexpectedly and with little publicity on May 15, 1980 — after the list of names had been tendered to Cuba. It criminalized behavior (travel to, from, and within Cuba), which previously had been expressly authorized and which, in fact, remained lawful for a time, except when done in connection with the transportation of Cuban nationals, an activity which also is not generally criminal. It penalized the paying of port fees in a foreign harbor and duly incurred hotel, motel and restaurant bills if done to assist the transportation of Cubans to the United States. These are activities which laymen do not consider wrong nor lawyers classify as *malum in se*.

The government argues that the evidence demonstrated the necessary mental state for a criminal violation of Section 515.415 of the TWEA. The government relies principally on the testimony of government officials who stated that they had warned the priests that the venture *might* be against the law. The government also relies on the priests' knowledge that they *might* be liable for repeat trips or boat safety violations; that they *might* be subject to forfeiture of their vessel under civil statutes; and that the government *generally disapproved* of the boatlift as dangerous and inadvisable.

However, the finding that a defendant is aware of matters such as those stated above is insufficient to sustain a finding of guilt under a statute requiring a voluntary breach of a known legal duty.

The government also argues that the priests' own behavior, including their fears and expressed concerns, indicated a voluntary breach of a known legal duty. The government relies on the priests' decision to captain the *God's Mercy* on the return voyage so that any possible onus might fall personally on them, and their own trial testimony that they would have gone ahead with the mission regardless of the law because of their moral commitment to those whose names were on the list submitted to the Cuban government. Their fears and expressed concerns, however, were understandable as normal caution and worry for the welfare of all concerned. They were simply insufficient to sustain a finding of a voluntary breach of a known legal duty. The judgment of the district court must be reversed.

UNITED STATES v. MACKO

United States Court of Appeals, Eleventh Circuit, 1999

Defendant Ralph Macko was accused of selling cigarette-packaging machinery and supplies to Cuba in violation of Section 515.201 of the Trading With the Enemy Act (TWEA). After a jury found Macko guilty, the district court held that the evidence was insufficient to support the guilty verdict. The United States appealed.

The evidence presented during the government's case-in-chief shows that the sales were through freight forwarders in Panama. The invoices did not disclose that Cuba was the ultimate destination. Macko visited Cuba by going through third countries.

In its order explaining the judgment of acquittal, the district court described the government's evidence as "primarily a paper case, made up of letters, faxes, shipping invoices, and other documents." This "paper trail," the court stated, "has too many twists and turns and dead ends to establish more than a tenuous inference that Macko acted with the requisite mental state for a criminal violation of Section 515.201 of the TWEA." The district court observed that the circumstantial evidence against Macko "is susceptible of more than one interpretation." The jury could reasonably infer that Macko knew that his conduct was generally unlawful, the court says, but such a general awareness of illegality is not sufficient to establish guilt here. Only by "mere speculation" could a jury conclude that Macko acted with the mental state required.

According to the government, the evidence against Macko, though circumstantial, established that he was aware of the prohibitions of the Cuban trade embargo and that he acted with the intent to avoid them to his profit.

In Section 515.201, the TWEA prohibits the sale of merchandise to Cuba or Cuban nationals without a license from the Office of Foreign Assets Control. Though a child of the Cold War that ended seven years ago with the Soviet Union's extinction, the Cuban embargo remains very much alive. The TWEA limits transactions with Cuba for many purposes, including both trade and travel, although subject to many exceptions. Its primary purpose is to stop the flow of hard currency from the United

States to Cuba.

In *United States v. Frade* (11th Cir. 1985), we held that "willfulness" under the TWEA entails a voluntary breach of a known legal duty.

To establish that Macko voluntarily breached a known legal duty, the government had to prove that he knew of the prohibition against dealings with Cuba and nevertheless violated it.

In *United States v. Frade*, the defendants were two Episcopal priests who arranged for a ship to bring 402 Cuban refugees to the United States in 1980 during what became known as the Mariel boatlift. While the priests were laying their plans, President Carter's administration attempted to gain some control over the sudden mass immigration by amending the TWEA to generally criminalize travel to or from Cuba in connection with the transportation of Cuban nationals. We held that the evidence did not establish that the priests voluntarily breached a known legal duty, principally because the government failed to establish that the priests had knowledge of any such duty.

The case against Macko is more convincing than the case against the priests in *Frade*. Indeed, *Frade* recites considerable evidence that the priests did not know about the provision of the TWEA at issue there. That provision barred conduct that until then had been expressly authorized by a different provision. Although U.S. officials warned the priests that their boatlift *might* be illegal, that is all that they did, and that was insufficient. Furthermore, the priests did not attempt to hide their travel to and from Cuba.

In this case, on the other hand, the trade ban in Section 515.201 of the TWEA was promulgated neither quietly nor unexpectedly. It was in effect long before Macko involved himself in the Cuban cigarette plan, and it was widely publicized. The provision does not apply only to certain goods or activities but states a broad prohibition against transactions with Cuba or Cuban nationals. We also find it telling that Macko actively concealed his travel to Cuba as well as the final destination of the cigarette machinery and supplies. He did not attempt to shield his contacts with Panama or Panamanians, nor did he hide the fact that he was acquiring cigarette-packaging machinery and supplies. The one aspect of the operation that he kept

secret was the Cuban connection. Macko traveled to Cuba through Panama in a manner that left no reference to Cuba on his passport. Macko initially lied to U.S. Customs agents about traveling and sending equipment to Cuba. Macko's correspondence about the project with other participants scrupulously avoided mentioning Cuba by name. Macko had experience in exporting machinery from the United States and was involved in international sales of various goods.

The inference that Macko acted as though it was illegal to deal directly with Cuba would seem to satisfy the element of voluntary breach of a known legal duty. A jury could reasonably conclude that Macko's secrecy about this single fact resulted from his knowledge of the Cuban embargo. Consequently, the district court erred in granting Macko's motion for a judgment of acquittal on the charge of criminal violation of Section 515.201 of the TWEA.

Reversed.